Supreme Court, U.S.
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No. 94-973

In The

Supreme Court of the United States

October Term, 1994

DOROTHY THOMAS,

Petitioner,

v.

MONSANTO EMPLOYEES' CREDIT UNION,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should issue to the Eleventh Circuit, which affirmed without opinion the judgment of the District Court rejecting Petitioner's racially discriminatory demotion and retaliatory discharge claims, where Petitioner has presented no circuit conflicts, no real Constitutional issues, and no real issues of federal statutory construction, but simply asks this Court to review as on appeal claimed errors of the District Court in rendering its oral Findings of Fact and Conclusions of Law under Fed. R. Civ. P. 52(a).

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Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

STATUTES INVOLVED

The following provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, are at issue in this Petition:

§ 2000e-2. **Unlawful employment practices**

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race . . . .

§ 2000e-3. **Other unlawful employment practices**

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . .

The following Federal Rule of Civil Procedure is at issue in this Petition:

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. . . .

STATEMENT OF THE CASE

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Petitioner, Dorothy Thomas, seeks to hold Respondent, Monsanto Employees' Credit Union ("MECU"),[1] liable for alleged racially discriminatory demotion and retaliatory discharge. Although Ms. Thomas's Statement of the Case is accurate to some extent, it contains numerous omissions and misstatements which MECU clarifies below.

The MECU is a state-chartered, member-owned, savings and lending institution located in Pensacola, Florida. R2-179. In 1987, the MECU was governed by a 13-member volunteer Board of Directors elected by the members of the MECU. R2-180-81, 184. That Board was comprised of ten white males, one black male, and two white females. R2-183-84. Ms. Thomas, who is black, was a loan officer for the MECU from 1980 until her demotion in July 1987 and subsequent discharge in August 1987. R1-2-3.

In early July 1987, MECU General Manager Doyle Griffiths became aware through the Collections Department that the number of delinquent car loans and repossessions was higher than normal. R2-192, 330-31. As a consequence, he directed Ms. Judy Cochran, who was supervising the Collections Department, to look into the matter. Her initial investigation revealed that the problems were coming from loans made for cars purchased from a used-car dealer called "Autos by Dave." R2-193. Examination of some Autos by Dave loan files revealed an unusual, and unauthorized, practice of cutting two checks – one for the dealer and a separate check to a used-car salesman, Buck English. R2-278.

On July 14, 1987, Mr. Griffiths presented the information he had collected to that point to the Board, who

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[1] As required by Supreme Court Rule 29, MECU states that it has no parent companies and no non-wholly owned subsidiaries.

made the decision to stop all loans with Autos by Dave until Mr. Griffiths could get to the bottom of the problem. The Board also directed Mr. Griffiths to investigate further and return with a report at the next meeting on July 21. R2-193, 278-79, 354.

During the week between July 14 and July 21, Ms. Cochran, at Mr. Griffiths's instructions, looked at more Autos by Dave loan files to determine what problems had led to the increased delinquencies and repossessions. R2-194, 229, 279. Ms. Cochran discovered that Ms. Thomas was the loan officer responsible for the files, and that she had deviated in many instances from the guidelines and practices established by the MECU for loan officers to follow in evaluating and processing loan requests. R2-194-95, 279.[2]

At the Board's July 21, 1987 meeting, Mr. Griffiths presented information about Ms. Thomas's large number of delinquent loans (now totaling over $115,000; Def.'s Exhs. 48-49), increased automobile repossessions, and potential loan losses, as well as her violations of MECU practices and procedures, such as cutting two checks (one to Autos by Dave and one to Buck English), improperly

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[2] Petitioner admits that she was responsible for "several" of the questionable Autos by Dave loans, but claims that no one else involved with that dealer was disciplined. Petition, p. 5. As the record shows, however, Ms. Thomas was responsible for more than "several" questionable Autos by Dave loans. She was responsible for virtually all of them. She also fails to mention that the files of the few Autos by Dave loans processed by other loan officers were checked prior to her termination, and no irregularities were found. Petitioner also fails to mention that her supervisor, Ms. JoAnne Cave (a white female), was disciplined for failing to detect Ms. Thomas's derelictions of duty. R2-203-204, 318-19, 365; Def.'s Exh. 90. Although Ms. Thomas asserts that no other loan officer in the history of the MECU had ever been demoted for loan delinquencies or repossessions, that was because no one had ever had such a serious problem before.

calculating debt ratios, and failing to check credit properly. R2-194-95, 230-33, 280, 355-56.

The members of the Board were fond of Ms. Thomas. Many of them had worked with her at the Monsanto plant in Pensacola and did not want to believe that she had exercised such poor judgment. Yet, when presented with clear evidence of Ms. Thomas's derelictions, the large loan delinquencies, and the appearance of impropriety in the dealings between Ms. Thomas and Buck English, they decided that they must get Ms. Thomas out of the loan officer position. Accordingly, the Board directed that Ms. Thomas be demoted. R2-196, 235, 356-57. Some of the Board members thought at that time that Ms. Thomas should be terminated, but were persuaded to accept demotion. R2-196, 356-57. The Board again directed Mr. Griffiths to continue his investigation, look at more Autos by Dave files, and determine whether other problems might surface. R2-196, 238, 280, 357-58.

Mr. Griffiths met with Ms. Thomas to notify her of the demotion. He presented Ms. Thomas with a final written warning concerning her situation. However, she refused to sign the warning until she met with the Board of Directors. Mr. Griffiths informed Ms. Thomas that he would try to arrange for her to speak to the Board at its next meeting on August 11. R2-200-201, 358.

Many members of the Board traveled to Orlando, Florida on August 6-8, 1987, for a convention. Because there would be some free time during the trip, the Board asked Ms. Cochran to prepare a packet of information containing examples of Ms. Thomas's malpractice copied from the actual loan files. Because the Board members are lay people and not loan officers, Ms. Cochran circled the numerous discrepancies and wrote on the paperwork an explanation of their significance. The Board met informally, reviewed this packet, and discussed some of the problems revealed to that date. R2-197, 280-81, 357-58.

Also during the period between July 21 and August 11, Mr. Griffiths met with the owner of Autos by Dave,

Dave Tinker, and learned that Buck English was selling older junk cars for whatever he could, and that the MECU, through Ms. Thomas, was the only place that would finance them. R2-197-99. When Mr. Griffiths informed Mr. Tinker that some of the repossessed cars lacked the represented options, he agreed to reimburse those members who had been cheated for the value of the missing options. R2-199.

Accordingly, Mr. Griffiths directed his staff to contact members who bought cars from Buck English to determine if their cars had the options they should. R2-200. One member who was called, Regenold Williams, informed MECU staffer Ms. Teresa Peacock that he was not a Buck English relative (even though represented to be in loan file documents), and that he was considering hiring a lawyer because the car he bought from Buck English and financed through the MECU was junk. R2-259-60.

On August 11, 1987, while Mr. Griffiths and his staff were continuing their investigation, the Board met with Ms. Thomas as she had requested. At the meeting, she stated that she did not believe that she had been treated fairly, and she asserted that other loan officers were doing the same things but had not been disciplined. R2-359.

The Board felt no desire to punish Ms. Thomas for her statement. R2-360, 364, 377, 397, 403, 406. The Board made two decisions, however, after Ms. Thomas left the meeting. First, the Board resolved to use the two weeks between then and the next Board meeting to broaden the investigation to include all loan officers and all of Ms. Thomas's Autos by Dave loan files to make sure that she was not being singled out and to be completely fair to her. R2-359-60. Second, because Ms. Thomas was visibly distraught over her demotion and was having a difficult

time keeping her mind on her work, the Board directed that she be given those two weeks off with pay.[3]

Unfortunately for Ms. Thomas, the expanded investigation of all Autos by Dave loan files revealed more and more examples of her malpractice. For instance, more files showed incorrectly calculated debt ratios, which resulted in loans being granted to people who had insufficient income to make the payments. In other instances, Ms. Thomas failed to note that certain borrowers were not credit worthy, or not even eligible to borrow from the MECU. There were also suspicious increases in vehicle selling prices to match loan values, and a suspicious number of "relatives" of Buck English who had become MECU members and received loans. Moreover, with regard to the unauthorized cutting of two checks, the amounts of commission payments to Buck English were outrageous in many instances, leading to the conclusion that some sort of a scam was being perpetuated. Finally, the MECU was repossessing more junk cars; delinquencies were still high; and concern had arisen among the Board members over possible liability of the MECU to disgruntled borrowers. R2-204, 247-49, 282, 361-63, 407; Def.'s Ex. 82.

On August 25, 1987, the Board met, reviewed most of Ms. Thomas's Autos by Dave loan files themselves, had their contents explained by MECU personnel, and thoroughly discussed the matter. As a result of the clearly egregious pattern of conduct revealed over time by the continuing investigation, the members of the Board, many with tears in their eyes, unanimously came to the personally difficult conclusion that their only alternative was to terminate Ms. Thomas's employment. It was clear to them, given the facts, that they could not condone the gross mishandling of their membership's assets in the fashion the direct and circumstantial evidence clearly

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[3] Ms. Thomas was told she was being given two weeks of paid vacation. R2-48.

revealed. The Board, as stewards of other people's money, could not justify maintaining Ms. Thomas's employment despite the personal friendships that existed between many of the Board Members and her. Accordingly, they directed that Ms. Thomas be discharged. R2-204-206, 284, 363-67, 372, 377-78, 385, 395-98, 402-404, 406-407. Ms. Thomas's supervisor, Ms. JoAnne Cave, was also demoted and her pay frozen for two years because of her failure to detect Ms. Thomas's malpractice. R2-203-204, 318-19, 365; Def.'s Exh. 90.

Ms. Thomas was treated exactly like all other similarly-situated loan officers. When the broadened investigation ordered by the Board on August 11 revealed possible improprieties by a white loan officer – Ms. Sammie Singleton – she was, likewise, suspended pending investigation and, ultimately, terminated by the Board in November 1987 for similar gross dereliction of her fiduciary duty to the MECU and its members in connection with her mishandling of real estate loans.[4] R2-207-208, 367-68, 397-98; Def.'s Exhs. 48, 49, 73, 85.

Ms. Thomas filed an EEOC charge and, after the EEOC issued a No Probable Cause Determination, filed this suit. After full discovery, the Honorable Lacey A. Collier conducted a three-day bench trial.[5] At the trial's conclusion, he orally made Findings of Fact and Conclusions of Law (hereafter "Findings and Conclusions") which rejected Ms. Thomas's claims in their entirety. Ms. Thomas appealed to the Eleventh Circuit, which heard oral argument and affirmed without opinion. The Eleventh Circuit also denied her Petition for Rehearing and Suggestion for Rehearing En Banc.

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[4] Ms. Singleton filed a Title VII retaliatory discharge action against the MECU, which was also tried by the same District Court Judge. He entered judgment for MECU in that case on April 3, 1992. Def.'s Exh. 86.

[5] Ms. Thomas inaccurately asserts that the trial lasted two days. Petition, p. 6.

SUMMARY OF THE ARGUMENT

This is not a proper case for grant of the writ of *certiorari*. Ms. Thomas can point to no conflict among the circuits, no real Constitutional issues, and no real issues of federal statutory construction. All she has is what she believes were erroneous Fed. R. Civ. P. 52(a) Findings and Conclusions. Not to be deterred, however, she fashions a denial of due process argument and the desperate contention that the Eleventh Circuit sanctioned the District Court's departure from the accepted and usual course of judicial proceedings so that intervention by this Court is needed.

Neither argument has any merit. The District Court's Findings and Conclusions are in compliance with Rule 52(a) and were made in the accepted and usual way. It is apparent, therefore, that Ms. Thomas is simply unhappy with the Findings and Conclusions made against her, and she seeks to turn this Court into another Court of Appeals by asking it to reverse them. Unfortunately for Ms. Thomas, this Court does not use its *certiorari* jurisdiction to determine whether a District Court's Findings and Conclusions are clearly erroneous. Because this case presents no question worthy of *certiorari*, Ms. Thomas's petition should be denied.

ARGUMENT

Although Petitioner has made two "arguments" why *certiorari* should be granted here, they both attack the oral Findings and Conclusions the District Court made pursuant to Fed. R. Civ. P. 52(a). By focusing on pieces of the District Court's Findings and Conclusions and ignoring the whole, Ms. Thomas claims they (1) were so deficient as to constitute a due process violation, and (2) failed to include all the findings required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Ms. Thomas's arguments have no merit, because, as will be shown below,

the District Court followed faithfully Fed. R. Civ. P. 52(a) and made all the Findings and Conclusions even arguably necessary under *McDonnell Douglas*.

Before addressing these points, however, MECU must comment on the unsupported factual assertions and emotional appeals Ms. Thomas has made in her effort to get this Court's attention. Ms. Thomas argues that the writ must be granted "to send a message" to the following: (1) District Courts, who feel that Title VII cases so "clog" their dockets that they "summarily dismiss" them without giving them "their 'day in court' "; (2) employer-defendants, so that they will recognize that Title VII litigants "will not be abused;" and (3) Title VII plaintiffs' practitioners, who would recognize that "there will be a chance of a fair trial to recover the fruits of their labor." Petition, pp. 7-8.

MECU submits that this Court should deny this Petition and, instead, send a message to Ms. Thomas that frivolous appeals, such as this, must end. There is no evidence that the District Court below believed that Ms. Thomas's case clogged its docket. Ms. Thomas had more than her "day in court" – she had three days in court, and she failed to prove her case. She has certainly not been "summarily" dismissed any where along the way by the federal courts. The Eleventh Circuit entertained an appeal by Ms. Thomas and granted her oral argument.

With regard to her second contention, at no time has MECU abused Ms. Thomas. Instead, she has caused MECU to expend much time and money in defense of what has apparently become a personal vendetta. If any party is being abused, it is MECU, because Ms. Thomas will not accept personal responsibility for her own malpractice.

Finally, the third message Ms. Thomas wants this Court to send is absurd in light of the record. Ms. Thomas did not raise a claim of unfairness in the conduct of the trial before the Eleventh Circuit. The reason is clear – Judge Collier granted Ms. Thomas every opportunity to

present evidence and cross-examine MECU's witnesses. The only unfairness here is Ms. Thomas's continued assertion of frivolous appeals.

Ms. Thomas has apparently lapsed into these unsupported arguments and emotional appeals to mask the fact that she is seeking *certiorari* to review alleged errors by the courts below in assessing the facts and granting judgment to MECU. However, this Court uses its *certiorari* jurisdiction to examine issues of Constitutional or federal statutory importance, not to engage in the correction of asserted errors in assessing evidence. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) ("'We do not grant a certiorari to review evidence and discuss specific facts.' ") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."). Because this Petition is simply another attempt at an appeal, it should be denied.

1. The District Court's Findings And Conclusions Were Sufficient And Did Not Violate Petitioner's Due Process Rights

Ms. Thomas asserts that the District Court's Findings and Conclusions violated her due process rights. It is clear, however, from both a review of Rule 52(a)'s requirements and the entire analysis of the District Court that no due process violation occurred.

Rule 52(a) provides in relevant part as follows: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon. . . . " Oral Findings and Conclusions are allowed. *Id.* The Fifth Circuit has summarized that Rule's requirements as follows:

> The federal rule relating to findings of the trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. . . . Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. . . . The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence.

Weber v. McKee, 215 F.2d 447, 451 (5th Cir. 1954) (citations omitted). The drafters of the Rule also intended that the process need not be laborious:

> The Rule does not place a severe burden upon the trial judge, for the judge "need only make brief, definite, pertinent findings and conclusions upon the contested matters."

5A *Moore's Federal Practice* ¶ 52.06[1] (1992) (quoting 1946 Advisory Committee Note). This is so because the purpose of the Rule simply is "(1) to engender care on the part of the trial judge in ascertaining the facts and (2) to make possible meaningful review in the appellate courts." *Gupta v. East Texas State Univ.*, 654 F.2d 411, 415 (5th Cir. 1981).[6] If the record gives substantial support for the ultimate conclusion that the employer's actions against the employee were indeed justified, and thus that no retaliatory motive was involved, any deficiencies in

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[6] In any event, a district court's failure to make all the findings sought by a party "does not require remand where the omitted findings would not change the outcome of the [case]." *Guidry v. Texaco, Inc.*, 430 F.2d 781, 784 (5th Cir. 1970). If the record supports the district court's conclusion, which it certainly does here, any error is harmless. *Irby v. Sullivan*, 737 F.2d 1418, 1421 n.2 (5th Cir. 1984).

the findings are irrelevant. *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985).

The entire record of this case has already been reviewed by the Eleventh Circuit and found to support the District Court's decision. But, even putting that aside, a review of all the District Court's Findings and Conclusions related to the retaliatory discharge claim, not just the few sentences quoted by Petitioner, reveals that the District Court provided far more than just conclusory findings. It considered all the evidence, as the excerpts quoted below make clear:

> I do have to take note that the evidence establishes that [Ms. Thomas] has made a significant number and amount of bad loans as a loan officer, and the credit union clearly had the right to question and figure out and determine why, which they undertook to do.
>
> I think the evidence supports that they found arguably incorrect debt ratios, at least from the files, unverified income, and no accounting for insurance, which is obvious in any mortgage or lien for automobile; questionable use of child support, particularly without verification – I don't attempt to list them all, but just to point to some of them – the two-check question, certainly is questionable when it comes to making a check out for a commission, and in the number and amount of loans that took place; the questionable memberships, I don't know that the same day you get the loan is too significant, but I think clearly when you look at the number of alleged relatives that one person has that she deals with should have caused her some concern with the issue. All of these things taken in combination cause question as to her abilities, particularly when they all come together in light of her relationship with Autos by Dave, and in particular Buck [English].

> I'm not sure that the question is whether she acted in good faith or not, she may have just been sloppy or may have been just careless, but clearly the record demonstrates incompetence in her role as a loan officer, particularly where it is that she came in contact with Buck [English]. She may well have been scammed, too . . . by one smooth operator, as apparently a lot of people were in this case.
>
> But whether she was part and parcel of that, he surely took advantage of her sloppiness, and perhaps I am more inclined to believe her trusting nature.

Petitioner's Appendix A, pp. 1a-3a.

With regard to the retaliatory discharge claim Ms. Thomas has highlighted in her first argument, the District Court set out the elements of her prima facie case as follows:

> In order to prove her retaliation claim, the plaintiff had the burden of proof that she engaged in activity protected under Title 7, and clearly she has done that with her claim and protest of discrimination; and that an adverse employment action was taken against her, and certainly that was, in fact, done; and thirdly, which is the important one, that there was causal link between the activity and the adverse employment action.

Id. at 3a. In analyzing Ms. Thomas's failure to establish the third element of her prima facie case, the District Court stated:

> Then, as to the causal link between the activity and the adverse employment action, I do find that the credit union through the management and the board acted in good faith. You certainly point out some instances where the information and particular items and areas might have been interpreted differently, or might in fact have been an error, but that does

> not distort the fact that they acted in good faith in relying on that data that they had before them, and made reasonable interpretations on their own, right or wrong, but that they acted in good faith.

Id. at 5a.

Although the District Court found that Ms. Thomas had not established a prima facie case of retaliatory discharge, it noted that

> [t]he ruling would remain the same, even if the plaintiff had proven her prima facie case, because the defendant did, in fact, articulate legitimate, nondiscriminatory reasons for the demotion and the termination, and the plaintiff has failed to meet her burden in establishing that these reasons constituted pretext for discrimination, because I find from the facts and the statistics that have been presented that they were not pretextual but that they did, in fact, exist.

Id. at 6a. The District Court thus concluded that the Board's reason for discharging Ms. Thomas was not pretextual because there was "sufficient basis for the termination." *Id.*

In closing, the District Court made clear that Ms. Thomas had simply failed to carry her ultimate burden of persuasion:

> Under the law of the circuit, therefore, you need only produce credible evidence to support these legitimate reasons, and does not carry the burden of persuasion. That burden remains with the plaintiff to show that her participation in the protected activity was a significant factor in Monsanto's decision to terminate her, and I do find that she has failed to meet that burden. In fact, she has not proved to the Court's satisfaction that race played any role in the defendant's actions in this particular case.

Id. at 6a-7a.

Despite the District Court's specific findings, Ms. Thomas cites cases which she says hold that a District Court must do more than issue conclusory findings on the pretext issue (Petition, p. 10), and asserts that the District Court below made only conclusory findings on the pretext issue relating to her retaliatory discharge claim. *Id.* at 11.

The cases she cites did not have the type of detailed Findings and Conclusions that were made here. For example, in *Redditt v. Mississippi Extended Care Centers*, 718 F.2d 1381 (5th Cir. 1983), the plaintiffs introduced evidence of numerous white employees who had engaged in similar misconduct but who had not been fired and of many black employees fired on the first rule infraction. *Id.* at 1385-86.[7] The employer rebutted the evidence. *Id.* at 1386. The District Court, faced with conflicting pretext evidence, simply made a general statement that plaintiffs had not proven pretext because a "'number of both black and white employees have testified in this case that blacks were not treated any differently than whites.' " *Id.* This conclusory finding, according to the Fifth Circuit, in no way indicated the factual basis for the District Court's

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[7] The other case Petitioner cites as directly "on point" with this one, *Murrell v. Trailways Southeastern Lines, Inc.*, 39 Fed. R. Serv. 2d 124 (4th Cir. 1984), is very different. In that case the trial judge indicated in colloquy with counsel that plaintiff had established a prima facie case and defendant had rebutted it, but that the case was a close one and he would give it more thought. A week later, the trial judge entered a memorandum opinion dismissing the case, and stated that he would rely on his statements from the bench to explain his decision unless plaintiff appealed, in which case he would prepare a more detailed opinion. The plaintiff did appeal, but, before the trial judge could prepare his opinion, he died. *Id.* at 125. In that case, the Fourth Circuit quite naturally reversed and remanded for a new trial because the inadequacy of the Findings and Conclusions precluded effective appellate review. The Findings and Conclusions here are not so fatally flawed.

decision, and flew in the face of the substantial record evidence that pretext had been proven. *Id.* at 1386-87.

That case poses no problem here. As explained in the Statement of the Case, *supra*, MECU's evidence showed that Ms. Thomas's discharge followed a further, continuing investigation. The information gathered between her demotion and discharge revealed even more dereliction of duty, and it became apparent that a demotion would not be sufficient. Ms. Thomas's Petition fails to describe any evidence she presented which showed that this legitimate, non-discriminatory reason for her termination was pretext, but which the District Court ignored and failed to make findings about.

The only "evidence" Ms. Thomas even refers to in her Petition is that her discharge came "on the heels of protected activity." Petition, p. 15. But, the District Court obviously rejected that evidence because it found no link between her protest and the termination. Indeed, the District Court found that the Board acted in good faith in discharging Ms. Thomas, based on the information before them. Petitioner's Appendix A, p. 5a.

Under the *Weber* decision discussed above, the District Court's findings here are adequate, because they provide a basis for the decision and are amply supported by the evidence. *See* Statement of the Case, *supra*. Moreover, the facts as found and the conclusions drawn show that the District Court took great care in ascertaining the facts, which provided the Eleventh Circuit with a substantive set of Findings and Conclusions that allowed for meaningful review.[8] Indeed, even Petitioner's trial counsel was satisfied that the facts and logic had been set

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[8] Even if the District Court's Findings and Conclusions on Ms. Thomas's retaliatory discharge claim do not meet the specificity requirement of Rule 52(a), the Eleventh Circuit obviously reviewed the record and determined that it supported the District Court's determination that Ms. Thomas's discharge was not retaliatory.

forth adequately. At the end of his oral ruling, Judge Collier asked the parties if there were "any other findings or points that you feel the Court should make?" In response to this request, Petitioner's trial counsel stated: "None, Your Honor." Petitioner's Appendix A, p. 7a. The appellate court has done its job in affirming the District Court's Findings and Conclusions as not clearly erroneous, with due regard to the District Court's opportunity to judge the credibility of witnesses. There is no need for another "appeal" to this Court.

2. The Eleventh Circuit Did Not Sanction A Departure By The District Court From The Accepted And Usual Title VII Analysis

Ms. Thomas attempts to fashion her second argument on one of the grounds stated in Supreme Court Rule 10 as a proper basis for *certiorari*.[9] Ms. Thomas claims that the District Court departed from accepted and usual Title VII analysis because "[e]ach of the prongs of the four part methodology of *McDonnell-Douglas*, requires the District Court to make a subsidiary finding." Petition, p. 12.

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[9] Supreme Court Rule 10 provides in relevant part as follows:

> **Considerations Governing Review on Writ of Certiorari**
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> **.1.** A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .

Petitioner has cited no case which holds that a District Court must, *after* a full bench trial of a Title VII case, structure its Findings and Conclusions so as to mirror exactly the *McDonnell Douglas* four-part analysis of how evidence should be presented. That is because no such case exists. In the words of this Court, *McDonnell Douglas* merely

> set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reasons for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citations and footnotes omitted).

The focus after a trial must instead be on the ultimate factual issue – has the plaintiff proven intentional discrimination – and not on the *McDonnell Douglas* four-part analysis. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983) (after trial, court must decide whether discrimination was proved, and there is no need to make the "inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' *Burdine*, 450 U.S., at 252, 101 S.Ct., at 1093, in deciding this ultimate question.").

On this ultimate issue in this case, the District Court explicitly stated that Ms. Thomas "has not proved to the

court's satisfaction that race played any role in the defendant's action in this particular case." Petitioner's Appendix A, p. 7a. That holding is amply supported by the Findings and Conclusions and the record. Even if the District Court were required to make Findings and Conclusions on each point of the four-part *McDonnell Douglas* analysis, that was done here, as explained below.

Ms. Thomas nevertheless argues first that the District Court's findings were in "confusion" on the issue of whether she had established a prima facie case on her demotion claim. Petition, pp. 12-13. MECU submits that any confusion is merely the result of Ms. Thomas's own attempt to create confusion where none exists. As shown below, the Findings and Conclusions clearly state that she did not prove her prima facie case.

The District Court first set out the following elements of a prima facie demotion case:

> That she was a member of the protected group, which she has certainly done; that . . . there was an adverse employment action that was taken against her, and clearly . . . that has been proven; and, thirdly, she must prove that she was treated more harshly than persons not in the protected group under similar circumstances.

Petitioner's Appendix A, p. 3a.

The District Court found, however, that Petitioner "failed to satisfy the third prong – that she was treated more harshly than persons not in the protected group under similar circumstances." *Id.* at 4a. The District Court considered the Petitioner's evidence and argument that white MECU employee Sue Culver was similarly situated to her but not demoted, but rejected it. According to the District Court,

> I have looked carefully at all the data and all the charts that have been prepared, and definitely cannot see the same relationship there, that [Ms. Culver's] loans and her ratios and foreclosure,

> or mortgage lien termination and losses simply do not compare to this [plaintiff].

Id. Instead, the District Court credited the MECU's evidence that it had treated a similarly-situated white employee – Sammie Singleton – the same by discharging her, too. *Id.* at 4a-5a.

The failure of Ms. Thomas to prove a prima facie case on her demotion claim could have ended the inquiry. But, the District Court nevertheless made the following Findings and Conclusions about the MECU's legitimate, non-discriminatory reasons for its action:

> Clearly, the demotion was proper in that this plaintiff was, in fact, failing to meet her responsibilities as a loan officer, and the board [of directors of the MECU] would have abrogated their responsibility, their fiscal responsibility to the members of the credit union by failing to take action in allowing her to continue in this fashion.

Id. at 5a.

On the issue of pretext, the District Court again found that Ms. Thomas had failed to carry her burden of proof:

> The question then becomes whether the reasons were, in fact, pretextual. And I do find, though, that the reason for the demotion is obvious from the record, I don't think there is any question whatsoever about that. . . .

Id. at 6a.

Ms. Thomas also attacks these Findings and Conclusions by arguing that the District Court allegedly made a finding that was contrary to what the MECU's position was at trial. Petition, p. 12, n.1. Ms. Thomas is again, however, the one that is confused.

Specifically, Ms. Thomas claims that the reason MECU advanced at trial for demoting Ms. Thomas – failure to follow procedures – was not the same reason advanced by the District Court in ruling that Ms. Thomas

was not similarly situated to Ms. Culver. In fact, the District Court was simply responding to Petitioner's claim that Ms. Culver was similarly situated because she allegedly had delinquencies, loan losses and repossessions that were as bad as hers. The charts and statistics to which the District Court referred were introduced to show, and did show, that only Ms. Singleton among all the loan officers came anywhere close to Petitioner in terms of the factors relied upon by Petitioner – and Ms. Singleton, a white, was demoted and terminated as well.

Ms. Thomas also disputes the factual findings the District Court made on the "similarly situated" issue. In her view, "any white loan officer who had any type of delinquent loan balances . . . would be similarly situated to the Petitioner." Petition, p. 13. That is not, and never has been, the law. *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984) (for employees to be similarly situated, the plaintiff must show that the misconduct for which she was discharged was "nearly identical" to that of employees outside the protected class). The District Court's finding on this point was not clearly erroneous.[10]

Ms. Thomas also believes that the District Court advanced "some theory that was not raised during the course of trial," and she feels she did not get to rebut it. Petition, pp. 13-14. The District Court did not, however, advance any theory. It simply judged the evidence that had been submitted. Petitioner did not have to rebut the District Court – she had to rebut MECU, and she could not. She was fully aware of the evidence MECU would submit once the Pretrial Stipulation was filed. She allowed in *without objection* all of the documents and charts (which Ms. Thomas calls "statistical data") that MECU prepared, which summarized her derelictions of duty and compared her to all other loan officers, thus

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[10] This argument by Ms. Thomas simply underscores that this *certiorari* petition is a poorly-disguised effort at an appeal.

buttressing MECU's testimony that she was not "singled out" while white employees got away with the same policy violations.

Ms. Thomas contends that, had she known MECU would use statistical data as the articulated reason for the demotion, she would have objected because the evidence was "after acquired." Petition, p. 14.

Three points must be made in response to this contention. First, this so-called statistical data was not after-acquired evidence. In other words, it is not evidence of which MECU was unaware when it fired Ms. Thomas and only later stumbled across when preparing for trial (such as a falsified employment application).

Instead, most of the information from which these exhibits were created was available and known to the Board when it demoted Ms. Thomas. For example, Defendant's Exhibit 70 is the vehicle repossession summary report covering 1987-1990 for loans made by Ms. Thomas. R2-459. MECU employee René Deese testified that she prepared Exhibit 70 from Ms. Thomas's loan files, which existed in 1987 and were introduced into evidence as Defendant's Exhibits 1 through 47. R2-458-59. The record shows that the Board was concerned about repossessions and delinquencies at the July 21 demotion meeting. *See* Statement of the Case. Exhibit 70 reflects that numerous "intent to repossess" letters had been sent out before this meeting. Thus, the Board had knowledge that many of Ms. Thomas's loans were delinquent and headed to repossession as of the demotion date, and Exhibit 70 merely summarizes the extant documents which established these facts.

Exhibit 73 summarizes in graph form the contents of two other exhibits – 48 and 49 – to which Ms. Thomas posed no trial objection.[11] Indeed, this graph simply

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[11] Exhibit 73 graphs the information contained in Defendant's Exhibit 48. R2-461-63. The delinquency numbers on

reflects the information the Board knew about Ms. Thomas's delinquencies in July 1987 – they totaled $115,732 and far exceeded that of any other loan officer at that time.

The testimony also reflects that the information in Exhibit 75 and part of Exhibit 74 was collected during the investigation ordered by the Board. R2-331-32. Exhibit 74 shows the actual dollar amount of auto loans written by loan officers, each loan officer's percentage of the total, and the percent of losses to loans made. Exhibit 75 was compiled from the monthly delinquency report for July 1987, which was in the Board's possession at the demotion date. R2-332; Def.'s Exh. 49. Therefore, the data in Exhibits 74 and 75, from which many of the remaining now objected-to exhibits were prepared, *see* note 12, *infra*, was not after acquired.

Likewise, Exhibit 82 is a summary of all the problems with Ms. Thomas's Autos by Dave files. R2-418. Again, Ms. Deese testified that she prepared Exhibit 82 from Ms. Thomas's loan files, which existed in 1987 and which were in evidence. R2-418-19. The testimony is clear that the Board was concerned about Ms. Thomas's failure to follow MECU policy in making loans at the July 21 demotion meeting. *See* Statement of the Case. Although it is unclear which of the 47 Autos by Dave loan files were reviewed with the Board at this meeting, every type of error or irregularity discussed at that meeting is reflected in Exhibit 82. Although this document did not exist on July 21, many of the problems detailed in it were known to and discussed by the Board at that time.

Exhibit 48 were taken directly from the monthly delinquency reports provided to the Board, which were collectively submitted as Exhibit 49. R2-461-62. Thus, the documents (Exhibit 49) upon which both Exhibits 48 and 73 are based were in existence and had been reviewed by the Board at the time of Ms. Thomas's demotion.

But even if all the evidence in these exhibits were after-acquired (which it is not), the MECU did not put them in the record simply to support the demotion decision, although many of them do. There was much oral testimony, unaided by these exhibits, to support the existence of the problems that led to the demotion decision. *See* Statement of the Case, *supra*. Instead, most of these exhibits were used by the MECU to show the District Court that there were no other loan officers similarly situated to Ms. Thomas, with the exception of white loan officer Sammie Singleton (who was also terminated a short time later for similar malpractice).[12]

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[12] Exhibit 73 shows that Ms. Thomas and Ms. Singleton had the highest loan delinquencies, by far, of any of the MECU's loan officers.

Exhibit 74 shows that Ms. Thomas had the highest percentage of losses to loans and 60.10% of the losses due to repossessions ($35,520.08) for the first eight months of 1987.

Exhibit 75 shows that in July 1987, Ms. Thomas had more delinquent auto loans, both in quantity and dollar value, than any other loan officer.

Exhibit 76 uses a bar graph to show more vividly some of the data reflected on Exhibit 74. R2-465. This chart shows that Ms. Thomas had twice as many losses due to automobile loan repossessions than her closest comparator, Ms. Morgan.

Exhibit 77 also uses a bar graph to display some of the information reflected on Exhibit 75. R2-466. This exhibit shows in striking fashion that Ms. Thomas's total auto loan delinquencies far exceeded Ms. Morgan's.

Exhibit 78 displays in graph form some of the information found in Exhibit 74. R2-467. This chart belies any assertion by Ms. Thomas that her delinquencies were high because she handled more auto loans than anyone else. Indeed, this exhibit reflects that she wrote fewer auto loans than many other loan officers, but she had, by far, the greatest percentage of auto loan losses.

Exhibit 79 is also based on Exhibit 74. R2-468. This graph simply reflects in a more readable fashion the fact that Ms.

Second, the MECU also used these exhibits to show the District Court that Ms. Thomas's malpractice cost the MECU a lot of money; that real, not pretextual, reasons drove the eventual termination as more and more information was learned; and that the Board was justified in its action.[13]

For example, the exhibits show not only that Buck English was the only salesman to whom Ms. Thomas cut direct commission checks,[14] but also that a large numbers of his "relatives" received auto loans.[15] Third, the exhibits

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Thomas's auto loan losses as a percentage of auto loans written were twice as high as her nearest comparator, Ms. Morgan.

Finally, Exhibit 80, also based on Exhibit 74 (R2-468), graphically illustrates how much worse Ms. Thomas was doing when compared to the other loan officers in July 1987. Fully 21% of Ms. Thomas's loans were delinquent as opposed to only 6.8% of those written by Ms. Morgan.

[13] For example, Exhibit 70 shows that Ms. Thomas's failures to follow policy eventually cost the MECU over $93,000 in losses. Loan losses just on cars purchased by members from Buck English at Autos by Dave equaled at $49,487.26. Exhibit 70 also supports the testimony by Board members that further repossession of junk cars between Ms. Thomas's demotion (July 21) and discharge (August 25) was a factor in the latter adverse action. Exhibit 70 shows five repossessions between the two above-mentioned dates (13. Williams; 17. Knight; 23. Nelson; 24. Suggs; and 35. English).

[14] Exhibit 70 shows that Ms. Thomas's unusual practice of cutting two checks – one for the dealer and one to the salesman – occurred only when Buck English was the salesman. R2-460.

[15] Exhibit 72, prepared from the loan files which were available to the Board at the time of Ms. Thomas's demotion, shows how many "relatives" of Buck English were granted loans by Ms. Thomas. R2-457-58. The District Court did not find that Ms. Thomas's granting of loans to so many Buck English relatives was "too significant," although it noted that this should have raised questions in her mind. R2-558. Exhibit 72 thus shows the extent of Ms. Thomas's carelessness.

summarized for the District Court the information that the Board was getting piece by piece from July 14, 1987 until August 25, 1987 in an easy to read format, so that the District Court could see the same picture eventually developed for the Board – total abdication of responsibility by Ms. Thomas.

For example, Exhibit 82 capsulates all of the problems detected with Ms. Thomas's auto loan files with Buck English as the salesman. R2-418-23. This exhibit notes "relatives" of Buck English; which loans had improperly calculated debt ratios (19 of 47; R2-424); which loans were made despite problems with income or employment verification; which loans were made despite the borrower's lack of established credit; the amounts paid to Buck English as commission ($27,406.67); instances where the amount loaned was greater than the purchase price agreed to by the buyer (R2-425-30); and the date when the MECU took action to notify borrowers of intent to repossess and the date of actual repossession. Moreover, the chart reflects that Ms. Thomas issued a separate check to Buck English in 40 of 47 loans she made where he was the salesman, (R2-423), and that 20 of these 47 car loans resulted in repossession, which at over 40%, is an unusually high percentage rate of repossession. R2-424.

The District Court recognized the usefulness of these types of exhibits, and referenced them three times in its Findings and Conclusions. In each instance, the exhibits assisted the District Court in its search to determine whether the MECU had treated Ms. Thomas differently because of her race or whether the articulated reasons for the decisions were pretextual.

For example, the District Court stated, "I have carefully looked at all the data and all the charts that have been prepared, and definitely cannot see the same relationship [between plaintiff and white loan officer Sue Culver], that her loans and ratios and foreclosures, or

mortgage lien terminations and losses simply do not compare to [Ms. Thomas]." Petitioner's Appendix A, p. 4a. The District Court also used the charts to assist it in finding that the only similarly-situated employee to Ms. Thomas in terms of foreclosures and losses was Ms. Sammie Singleton, a white loan officer also demoted and discharged by the Board. *Id.* at 4a-5a. Finally, in determining whether plaintiff had proven pretext as to either of her claims, the District Court stated: "I find from the facts and statistics that have been presented that [the articulated reasons] were not pretextual but that they did, in fact, exist." *Id.* at 6a.

Because a great deal of the information summarized in the now objected to exhibits actually existed in July 1987, because the exhibits had uses other than showing the legitimate, non-discriminatory reasons for the demotion, and because the District Court properly understood and utilized the exhibits, use of the "statistical data" was proper. The facts stated therein fully support both the Board's and District Court's decisions and do not constitute "after-acquired" evidence.

Ms. Thomas next argues that the District Court's analysis of her retaliation claim departed from the usual and accepted analysis in Title VII cases. Petition, pp. 14-15. Again, this argument is based on an erroneous reading of the record. The District Court did not rule, as Ms. Thomas asserts, that she failed to establish a prima facie *retaliation* case because she could not point to a white person that had been treated better than she. *Id.* Instead, the District Court held that Ms. Thomas had not established a prima facie *demotion* case because of that failure of proof. Petitioner's Appendix A, p. 4a.

The Findings and Conclusions clearly state that Ms. Thomas failed to establish a prima facie retaliatory discharge claim because there was no causal connection between the termination and the protected activity. Although Ms. Thomas apparently believes that the causal connection is proven if the termination follows two

weeks after the protected activity (Petition, p. 15), that is not so. Indeed, the District Court addressed this contention and rejected it as follows:

> Then, as to the causal link between the activity and the adverse employment action, I do find that the credit union through the management and the board acted in good faith. You certainly point out some instances where the information and particular items and areas might have been interpreted differently, or might in fact have been an error, but that does not distort the fact that they acted in good faith in relying on that data that they had before them, and made reasonable interpretations on their own, right or wrong, but that they acted in good faith.

Id. at 5a.

The final contention raised by Petitioner is yet another attempt to reverse factual findings made against her. In this argument, Ms. Thomas claims that the reasons MECU advanced at trial as to why she was terminated do not meet what even she admits is a "light burden of production." Petition, p. 16. To support this internally contradictory assertion, Ms. Thomas claims that MECU's articulated reasons for the termination were her unhappiness after being transferred and the fact that she cried a lot. *Id.* Ms. Thomas has, again, engaged in selective review of the record to mislead this Court.[16]

The evidence submitted by MECU, and obviously credited by the District Court, was that the termination came about because of additional damaging information MECU learned about Ms. Thomas during the continuing investigation following her demotion of not only her loan files, but also the files of all other loan officers. *See*

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[16] The basis for this claim is testimony by the MECU General Manager, who was not a member of the Board who made the decision, and he had no vote. R2-183-84.

Statement of the Case, *supra*. Ms. Thomas's selective citation to the record should be rejected.

CONCLUSION

For the reasons set forth herein, this case is not a proper one for *certiorari*. Ms. Thomas has presented no circuit conflicts, no real Constitutional issues, and no real issues of federal statutory construction. Instead, her artfully crafted due process deprivation argument and her assertion that the Eleventh Circuit allowed the District Court's maverick Fed. R. Civ. Pro. 52(a) Findings and Conclusions to go unreviewed are simply efforts to disguise the fact that her Petition is really nothing more than another attempt at an appeal. She seeks to have Rule 52(a) Findings and Conclusions overruled because she disagrees with them. This Court's *certiorari* jurisdiction is not reserved for that type of case. Accordingly, the instant Petition should be DENIED.

Respectfully submitted,

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